No. 15088

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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Jurisdictional Statement.

The basic jurisdiction of the District Court is founded upon Title 18, U. S. C. A., Section 3231 (June 25, 1948, c. 645, 62 Stat. 826) and initially arose in this case by reason of a violation of Title 38, U. S. C. A., Section 697 (June 22, 1944, c. 268, Title VI, par. 1500, 58 Stat. 300; July 26, 1947, c. 343, Title II, par. 205(a), 61 Stat. 501; April 3, 1948, c. 170, par. 5, 62 Stat. 160; 1953 *re* Org Plan No. 1, pars. 5, 8, effective April 11, 1953, 18 F. R. 2053, 67 Stat. 631), and Section 715 (March 20, 1933, c. 3, Title I, par. 15, 48 Stat. 11). Probation was granted under Title 18, U. S. C. A., Section 3651 (June 25, 1948, c. 645, 62 Stat. 842) and a petition to set aside the judgment was made by appellant under Title 28, U. S. C. A., Section 2255 (June 25, 1948, c. 646, 62 Stat. 964).

The jurisdiction of this court was invoked under the provisions of Title 28, U. S. C. A., Section 1291 (June 25, 1948, c. 646, 62 Stat. 929) and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended Dec. 27, 1948, effective Jan. 1, 1949).

Statement of the Case.

Appellant Barbara Karrell was convicted after jury trial on eight counts of an indictment charging her with alleged offenses against the United States under Sections 697 and 715 of Title 38, U. S. C. A. Generally all these counts involved activities of Miss Karrell which resulted in her knowingly making a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, 38 U. S. C. A., Section 694, *et seq.* The operative facts of this case have been ably set out by appellant in her statement of facts contained in pages 4 to 7 inclusive in her opening brief and are hereby incorporated and approved by the appellee for the purposes of this appeal. Generally it will be noted that as the result of her conviction she was placed upon a five-year period of probation which expired January 24, 1956. On this latter date Miss Karrell noticed a motion to vacate sentence before the Honorable William C. Mathes at San Francisco, California. On the same date the Honorable William Mathes denied the motion to set aside the judgment and notice of appeal from the ruling was thereupon filed. Thereafter, following the filing of notice of appeal, Miss Karrell's period of probation expired during the pendency

of the appeal. A motion by the Government to dismiss the appeal as moot was denied by this Honorable Court on November 27, 1956 without prejudice to a renewal thereof in a hearing of the matter on the merits.

Outline of Arguments.

I.

IT IS SETTLED BY THE DECIDED CASES THAT THE APPELLANT WAS CORRECTLY CHARGED IN THE INDICTMENT WITH A VIOLATION OF THE LAWS OF THE UNITED STATES.

II.

APPELLANT'S PETITION CANNOT BE ENTERTAINED AS A PETITION FOR A WRIT OF CORAM NOBIS.

III.

APPELLANT'S STATUS AS A PROBATIONER DOES NOT ENTITLE HER TO RELIEF UNDER TITLE 18, U. S. C. A., 2255, AS A "PRISONER IN CUSTODY".

IV.

APPELLANT CANNOT MAINTAIN THE INSTANT APPEAL INASMUCH AS IT HAS BECOME MOOT.

ARGUMENTS.

I.

It Is Settled by the Decided Cases That Appellant Was Correctly Charged in the Indictment With a Violation of the Laws of the United States.

Appellant contends that the acts charged in the indictment did not constitute allegations of violations of the laws of the United States. Some background of the sections in question may prove helpful by way of illustration.

In 1933 certain statutes were passed providing for compensation pension and general veterans' relief. Penal provisions applicable for violations of these sections were contained upon codification in Sections 712, 713, 714 and 715 of Title 38, United States Code. More specifically, Section 712 applied generally to false affidavits concerning claims, Section 713 applied to accepting payments of pensions after the right thereto had ceased, Section 714 applied to receiving a pension when a person was not entitled thereto, and Section 715 applied generally to the making or conspiring to be made false statements concerning any claims. Following World War II public demand for veterans' benefits legislation resulted in the Servicemen's Readjustment Act of 1944 which in its codified form is presently contained in Title 38, United States Code, Section 694 *et seq.* In regard to penal provisions for violation of the new legislation, rather than enact concurrent legislation, Congress incorporated certain of the penal provisions of the prior legislation, and applied them equally to similar violations under the new laws. This

incorporation was worked by Section 697 of Title 38, U. S. C. A. which provides in pertinent part:

> "(a) Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of Sections 450, 451, 454a and 556a of this title, shall be for application under this chapter . . . June 22, 1944, c. 268, Title VI, paragraph 1500, 58 Stat. 300; July 26, 1947, c. 343, Title II, paragraph 205a, 61 Stat. 501; April 3, 1948, c. 170, paragraph 5, 62 Stat. 160; 1953 *re* Ord Plan No. 1, paragraphs 5, 8, effective April 11, 1953, 18 F. R. 2053, 67 Stat. 631.)"

It can thus be seen by this above quoted section that certain of the penal provisions of the old law (1933 law) are governing to applicable violations under the new law (1944 law).

Appellant Karrell was convicted under Sections 715 and 697 (of Title 38, U. S. C. A.). As set out in Appellant's Opening Brief at page 4, Count Four of the indictment is illustrative of the offenses charged and reads as follows:

> "On or about October 22, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Barbara Karrell, did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, 38 U. S. C. A., Section 694 *et seq.,* in that defendant did cause the Bank of America National Trust and Savings Association, 1358 Third Street, Santa Monica, California Branch, to certify in a home loan report presented to the United States

> Veterans' Administration that the price paid by Philip Bentivegna, a veteran of World War II, for the purchase of a residential lot of 4907 Beloit Avenue, Los Angeles, California, as to which a loan guarantee is sought from the Government of the United States, was $1,550.00, and that the price paid by said veteran for such property did not exceed the reasonable value thereof of $1,650.00 as determined by a proper appraisal dated January 24, 1946, made by Robert E. Gilliland, an appraiser designated by the Administrator of Veterans Affairs; whereas as defendant well knew and caused to be concealed from said bank and Veterans Administration, a total price demanded and received by the defendant from said veteran for such property was $2,150 and did exceed the reasonable value thereof as determined by a proper appraisal."

The indictment therefore charges a violation of Section 715, Title 38, U. S. C. A., as incorporated by Section 697, Title 38, U. S. C. A.

It is alleged by appellant that the District Court had no jurisdiction to render the judgment of conviction inasmuch as the acts charged in the indictment do not constitute allegations of violations of the laws of the United States. In support of this position appellant argues that Section 697 incorporates Section 715 and inasmuch as Section 715 by its terms is limited to violations under Sections 701, 702, 703, 704, 705, 706, 707-710, 712, 715, 717, 718, 720 and 721, it cannot apply to violations under Section 697 which is not within the enumerated sections contained therein. Basic to this view is the assumption contained at page 10 of appellant's brief that

all the terms of Section 715 are incorporated in Section 697. By this bit of legal legerdemainistic reasoning appellant concludes that decisions of this Honorable Court in this and other cases and decisions of other courts on the same subject are distinguishable. Whether the result would follow if appellant's premise were correct is perhaps arguable, but doubtful. It is the position of the appellee, United States of America, that appellant makes an unwarranted assumption in a basic interpretation of the statutes involved. This is apparent from a careful reading of Section 697 (*supra*) that "the administrative definitive and *penal provisions* under Sections . . . 715 . . . shall be applicable under this chapter." In order to give effect to the admitted intention of Congress (App. Br. p. 12) a careful reading of the above quoted statute reveals that it is not Section 715 in its entirety with the contained restrictions which was intended to be incorporated. Section 697 clearly states that rather than the section as a whole (715) it is only the penal provisions which are intended to be incorporated. Such an interpretation is the obvious import of the decisions in this court in other cases construing these sections. As stated by this Honorable Court in *Young v. United States* (9th Cir., 1949), 178 F. 2d 78:

> "Incorporation of statutes by reference has been a common practice in federal legislation, and the adoption of an earlier statute by reference makes it as much a part of the latter statute as though it had been incorporated at full length.
>
> "That Congress intended to bring into the Servicemen's Readjustment Act of 1944, *the criminal penal-*

> *ties of Section 715,* seems apparent in the light of the legislative history of the Act."

Again, in the appeal on the merits in the instant case formerly before this Court, a similar interpretation was adopted when Judge Stephens, speaking for the Court, stated in *Karrell v. United States* (9th Cir., 1950), 181 F. 2d 981, 984:

> "A similar indictment before this Court was held to charge an offense. In Young v. United States (9th Cir., 1949), 178 F. 2d 78, 80, certiorari denied (1950), 70 S. Ct. 573, we decided a like point. It was there urged 'that Congress had failed to denounce the act charged in the indictment as a crime, and even if an attempt to accomplish this purpose is manifest, such intention is not expressed in clear and unequivocal language.' We ruled that Congress intended to incorporate by reference *the penal provisions of Section 715* of Title 38, U. S. C. A., into the Servicemen's Readjustment Act of 1944, 38 U. S. C. A., Section 694, *et seq.,* and that such purpose was accomplished by Section 697 of Title 38, U. S. C. A."

See also cases cited by appellant.

In view of the premises, not only has the question presented in the instant appeal been litigated adversely to appellant's contentions by this Honorable Court, but additionally it has been so adversely settled in the same case in the appeal upon the merits. Accordingly, the Government takes the position that Section 697 (*supra*) works a valid incorporation of the *penal provisions* of Section 715 (*supra*) and the limitations included in 715 have no application by way of divesting operation of Section 715 to violations under the Servicemen's Readjustment Act of 1944.

II.

Appellant's Petition Cannot Be Entertained as a Petition for a Writ of Coram Nobis.

Subsequent to the filing of the notice of appeal and during the pendency of the appeal, the United States, appellee herein, made motion to this Honorable Court to dismiss the instant appeal as moot. By order of November 27, 1956, this motion was denied without prejudice to renewal at the time of hearing on the merits. In making this order, this Honorable Court invited counsel to discuss the question,

> "Whether the motion in the district court purportedly filed pursuant to Section 2255 of Title 28, U. S. C. A. may, upon such appeal or for the purpose of such a motion, be considered to be a proceeding in the nature of *coram nobis* within the meaning of the decision in *United States v. Morgan*, 346 U. S. 502."

This portion of appellee's argument is in response to such invitation.

Relying upon *United States v. Morgan, supra,* appellant takes the position that the

> "Writ of *Coram Nobis* still exists, and that it is not necessary that a prisoner be in custody under *coram nobis* to obtain review, where his conviction was based upon an error of fundamental or constitutional sort."

Appellant then seeks to bring her present motion under Section 2255 of Title 28, United States Code, within the purview of *coram nobis* as outlined in the *Morgan* case. In so doing appellant ignores that in its basic function a writ of *coram nobis* lies solely to view errors of fact extrinsic of the record and which were not brought to the

Court's attention through no failure of the petitioner. It is readily discernible that inasmuch as appellant's attempt to secure relief under Section 2255, *supra,* is based upon a pure question of law (namely a question of statutory construction), remedies in the nature of a writ of *coram nobis* are not available to her. As is stated in 24 C. J. S. p. 151, Criminal Law, Section 1606:

> "The writ of error *coram nobis,* or *coram vobis,* is not available to correct errors of law, and therefore does not lie to set aside a conviction because the information does not state a public offense . . ."

Any attempt upon the part of appellant to question the sufficiency of the indictment in the instant case by a motion in the nature of a writ of *coram nobis* must accordingly fail. In *State v. Woodward* (1945), 160 P. 2d 432, the Court said:

> "A writ of *coram nobis,* where available, seeks to obtain a review of a judgment on the ground that certain mistakes of *fact* have occurred which were unknown to the Court and to the parties affected, and that, but for such mistakes, the judgment would not have been rendered.
>
> 31 Am. Jur. on Judgments, Section 802;
>
> *State v. Richardson,* 291 Mo. 566, 237 South Western 765;
>
> *Alexander v. State,* 20 Wyo. 241, 123 Pac. 68, Ann. Cas. 1915(a) 1282.
>
> However, for a party to be entitled to this writ, it must appear that the failure to present the facts to the Court was not due to any negligence or fault of the party seeking the writ." (Emphasis added.)

As stated in *In re Dyer* (1948), 193 P. 2d 69-72:

> "The writ of error *coram nobis* is issued to correct an error of law that is based upon some issue of fact.
>
> *People v. Reid,* 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435;
>
> *People v. Darcy,* 79 Cal. App. 2d 683, 180 Pac. 2d 752;
>
> *People v. Dale,* 79 Cal. App. 2d 370, 179 Pac. 2d 870.
>
> Whatever may be said about the inception of the writ, the recognized present purpose is to correct an error of fact which was unrecognized prior to the final disposition of the proceeding. It is not intended as a means of revising findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence.
>
> *People v. Reid, supra;*
>
> *People v. Mooney,* 178 Cal. 525, 174 Pac. 325;
>
> *People v. Cabrera,* 7 Cal. 2d 11, 59 Pac. 2d 804;
>
> *In Re Paiva,* 31 Cal. 2d 503, 190 Pac. 2d 604.
>
> To correct an error of fact it is often necessary to modify a legal ruling, order, judgment, or decree, but *it is the fact and not the law that is the subject of change.*" (Emphasis added.)

In *People v. Butterfield* (1940), 99 P. 2d 310, the District Court of Appeal for the Third District of California considered the nature of the writ as follows:

> "The writ of *coram nobis* lies to correct *an error of fact, as distinguished from an error of law,* when no statutory remedy for the wrong exists, or when the statutory remedy is inadequate.
>
> *People v. Mooney,* 178 Cal. 525, 529, 174 Pac. 325;

People v. Reid, 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435;

27 Cal. Law Review 228.

"When a defendant is deprived of the right of trial by jury by extrinsic fraud, misrepresentation, coercion, unlawful persuasion, which neither a demurrer nor a motion in arrest of judgment will reach, the writ may lie. *It is also true that when the wrong complained of has been once presented on an appeal from the judgment, the writ will not lie to again review the same matter.*" (Emphasis added.)

The last sentence of the above quoted case is particularly appropriate to the facts of the instant case, inasmuch as the wrong complained of herein has already been presented to this Honorable Court in the appeal upon the merits and decided adversely to appellant's contentions.

See:

Karrell v. United States (9th Cir., 1950), 181 F. 2d 981.

Peculiarly applicable to the instant case is the following language of the Supreme Court of Missouri, *en banc,* in the case of *City of St. Louis v. Franklin Banck et al.* (1943), 173 S. W. 2d 837, 847:

"Appellants say that is not enough; that the allegation in the condemnation petition was jurisdictional. We need not go into that. It is not an assignment of error based on new facts, but a pure question of law based on patent record facts which cannot be raised by a motion in the nature of a writ of *coram nobis.* So we overrule the assignment of error."

Likewise, in the instant case Appellant Karrell presents not a question of fact as could be perhaps reached by a

writ of *coram nobis,* but a pure question of law, going as it does to the legal construction of Sections 697 and 715 (both *supra*).

Indeed, even in the *United States v. Morgan* itself (*supra*), the limitation of *coram nobis* to questions of fact is noted. It is stated by the Court at page 507 of the United States Report:

> "The writ of *coram nobis* was available at common law to correct errors of *fact.* It was allowed without limitation of time for *facts* that affect the 'validity and regularity of the judgment' . . ." (Emphasis added.)

And in note 9 on the same page we quote from 2 Tidd's Practice (4th Am. Ed.), 1136-1137, as follows:

> "If a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* Court, by a writ of *coram nobis,* or *quae coram nobis resident;* so called from its being founded on the record and process, which are stated in the writ to remain in the Court of the Lord the King, before the King himself, as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgments; for error in fact is not the error of the judges, and reversing it is not reversing their own judgments. So upon a judgment in the King's Bench, if there be error in the *process,* or through the default of the *clerks,* it may be reversed in the same Court by writ of error *coram nobis.*"

See also, history and function of the writ of *coram nobis, United States v. Wright* (D. C. Ed., Ill., 1944),

56 Fed. Supp. 489, 492; *People v. Mooney* (1918, Cal.), 174 Pac. 325, cited with approval by this Honorable Court in *Audette v. United States* (9th Cir., 1938), 99 F. 2d 113. Additionally, see cases collected at page 63 in the syllabus of the *United States v. Myer,* 235 U. S. 55.

From the foregoing it is apparent that the writ of *coram nobis* lies to correct only errors of extrinsic fact, and will not lie to correct errors of law. More particularly, it will not lie to test the sufficiency of an indictment. Appellant must therefore fail in her effort to seek relief by writ of *coram nobis* where her petition is founded upon a pure question of law involving statutory interpretation. Accordingly, it is the position of the Government that in bringing her petition under Section 2255 of Title 28, U. S. C. A., appellant must be governed by the rules applicable to *habeas corpus* and its ancillary statute, 28 U. S. C. A., Section 2255, and not by any rules applicable to the common law writ of error *coram nobis.*

III.

Appellant's Status as a Probationer Does Not Entitle Her to Relief Under Title 18 U. S. C. A. 2225 as a "Prisoner in Custody."

Appellant's motion in the Court below to vacate her sentence was brought under 28 U. S. C. A. 2255, which provides in applicable part:

> *"A prisoner in custody* under sentence of a Court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the Court was without jurisdiction to impose such a sentence, or that the sentence was in excess to the maximum authorized

by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time. . . ." (Emphasis added.)

This section was added in the revised judicial code to correct abuses resulting from several Supreme Court decisions enlarging the scope of relief under habeas corpus. Since its passage, it has been established in this and other circuits that the scope of relief under Section 2255 is coterminous with that afforded by habeas corpus.

Crow v. United States (9th Cir., 1950), 186 F. 2d 704;

United States v. Bradford (2nd Cir., 1952), 194 F. 2d 197;

In re Roland (1949), 85 Fed. Supp. 550.

Therefore, it may be said that precedent establishing the nature and scope of habeas corpus is equally applicable to a motion arising under Section 2255. From a consideration of Section 2255 and of 28 U. S. C. A. 2241, the habeas corpus statute, it is apparent that these sections are available solely to persons or prisoners "in custody." Throughout its history, the distinguishing requirement of the great writ has always been that the person seeking it must be actually and physically restrained of his liberty. Since the function of the writ is to free the petitioner from unlawful detention, once the object is accomplished, whether through bail, action of the writ, release, discharge, parole, or probation, the writ can do no more and the questions presented by it become moot. The aforesaid prerequisite of actual detention is expressed throughout the cases of this country and of England.

In *Unverzagt v. United States* (9th Cir., 1925), 5 F. 2d 494, 495, this Honorable Court held that where a petitioner was released on bond pending an appeal, the appeal was rendered moot. As stated at page 495:

> "The execution and acceptance of the bond preclude the appellant's right to habeas corpus. He was no longer restrained of his liberty."

In *Wales v. Whitney* (1885), 114 U. S. 564, Wales was notified of his impending court martial, and was informed, "You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington." Wale's petition for a writ of habeas corpus was denied on the ground that he was in no way deprived of his liberty by the above order. The Supreme Court, in discussing the necessity for restraint or imprisonment to predicate habeas corpus, stated at page 571:

> "Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists, or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action.
>
> "It is said in argument that such is the power exercised over the appellant by the order of the Sec-

retary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him, and though it is said that a file of marines or some proper officer could have been sent to arrest and bring him back, this could only be done by another order of the secretary, and would be another arrest and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his convenience. and in regard to which he exercises his own will."

In the instant case, while the appellant might have been subject to some moral restraint by reason of the terms of her probation, her case falls into the second rather than the first category (*supra*). She was at all times free on probation. She is now free of even this technical restraint. Any force which could have controlled her was inchoate and not immediate. As in the example in the second category (*supra*), no one could have legally interfered with her freedom. It would have taken another order of the Court to revoke her probation before the physical power of control could be called into demonstrative action. While fear of this possibility may or may not have controlled the appellant to a greater or lesser degree within the limits of her probation, such fear was a moral restraint in regard to which she exercised her own will, and was not a restraint imposed by a physical power or control.

In *Dodge's* case, 6 Martin, La. 569, commented upon in *Wales v. Whitney* (*supra*), the petitioner was imprisoned for debt, but was released on bond. He subsequently was granted a writ of habeas corpus. The Supreme Court, in reversing, stated:

> "It appears to us that the writ of habeas corpus was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a Court or a judge to cause any more restraint to cease. The sheriff did not detain him, since he had admitted him to the benefits of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint, it could not be an illegal one."

Similarly, in *Respublica v. Arnold,* 3 Yeates 263, cited in *Wales v. Whitney* (*supra*), the Court held under the Pennsylvania reenactment of the original Habeas Corpus Act, habeas corpus would not lie for a person already enlarged on bail.

In *Stallings v. Splain* (1920), 253 U. S. 339, it was held that one enlarged on bail is no longer under actual restraint so as to be entitled to the writ of habeas corpus.

In *Sibray v. United States* (3rd Cir., 1911), 185 Fed. 401, the Court of Appeals in reversing the order of the District Court discharging relators on habeas corpus, stated at page 403:

> "Admittedly, the relator was not in the custody of one to whom the writ was directed, nor was she restrained of her liberty, except so far as the friendly custody of her bail and the obligation thereunder, that she should be produced when demanded to appear before the Inspector for further hearing, or

for deportation, was such a restraint. The writ of habeas corpus ad subjiciendum, as its name indicates, has no other office than to require the production of the body of one in custody by the person claiming custody thereof, before a court of competent jurisdiction, in order that the cause of such detention in custody may be inquired into. By the giving of the bail bond, the relator had, for the time being, waived the right to this writ. She was no longer in the custody of the Inspector, nor restrained by him of her liberty. If she intended to contest the legality of the proceedings for her deportation, she should have waited until she was again in the custody of the Inspector for further hearing or deportation. The custody complained of must be actual, not constructive, in the sense that word is used by the respondent in his return."

In *United States ex rel., Wallnar v. Tittemore* (7th Cir., 1932), 61 F. 2d 909, the Court stated:

> "Before one can successfully seek a writ of habeas corpus, he must be actually restrained."

To the effect that habeas corpus lies only to obtain release from actual restraint, rather than mere moral or constructive restraint, see also:

Johnson v. Hoy (1913), 227 U. S. 45;

Rose v. Washington Times Co. (C. A. D. C., 1928), 23 F. 2d 993;

Weber v. Squire (1942), 315 U. S. 810;

Doss v. Lindsley (D. C. Ed. Ill., 1944), 53 Fed. Supp. 427, 430;

Hawley v. United States (10th Cir., 1952), 194 F. 2d 52;

In re Roland (1949), 85 Fed. Supp. 550;

Roland v. State of Arkansas (8th Cir., 1950), 179 F. 2d 709;

Florentine v. Landon (9th Cir., 1953), 206 F. 2d 870 (concurring opinion);

and for an extensive treatment of a parolee's right to habeas corpus, see: 148 A. L. R. 1240, *et seq.*

The sole case discernible contrary to those above is *MacKenzie v. Barrett* (1957 Cir.), 141 Fed. 964, of which it was said in *In re Roland* (*supra*) at page 555:

> "While this case (MacKenzie) does in fact so hold, it was decided in 1905 prior to the decisions in *McNally v. Hill,* (*supra*); *Stallings v. Splain,* (*supra*); and *Johnson v. Hoy,* (*supra*), and is out of harmony with the views expressed in those cases. Moreover, *MacKenzie v. Barrett* may well have been overruled by the later decision of the 7th Circuit in *United States ex rel. Wallnar v. Tittemore,* 61 F. 2d 909, 910, wherein (although the MacKenzie case was not referred to) habeas corpus was refused one at liberty on bail, and the Court, citing *Stallings v. Splain,* (*supra*), said, *'Before one can successfully seek a writ of habeas corpus he must be actually restrained'.*" (Emphasis added.)

Problems arising where, as in the instant case, a person seeking remedy under habeas corpus or Section 2255 (*supra*) is at the time of seeking such relief enlarged on probation or parole, stem largely from the conceptualistic notion that a person at large on probation or on parole is in custody to the same extent as a prisoner confined behind the walls of the Federal penitentiary at Alcatraz Island. It is not only in the field of habeas corpus and 2255 (*supra*) that this conceptualistic fiction gives

rise to weighty problems vitally affecting the administration of justice. It is just such a conceptualistic view of the status of probation which gave birth to the problems presented in the case of *Strand v. Schmittroth* (9th Cir., 1956), 233 F. 2d 598; rehearing denied, *Strand v. Schmittroth,* 235 F. 2d 756. Rehearing *en banc* granted and argued November 20, 1956. (*Strand v. Schmittroth* (9th Cir. No. 14733.)) Of interest in this connection are the words of Judge Chambers in his dissent in the first *Schmittroth* case, 233 F. 2d 598, wherein he stated:

> "To hold that the Federal District Court was right requires us to embrace a fiction that one who is on probation is in the 'custody of the law'. When that fiction produces unseemly judicial conflict, as this does, the fiction ought to give way. One can be subject to a court's orders without being in the full 'custody of the law', without having a protective casing of immunity."

In the light of the premises, it is apparent that as used in Chapter 153 (28 U. S. C. A.) and as specifically used in these two sections (2241 and 2255), "in custody" means an actual restraint rather than mere moral restraint as is the case of appellant Karrell in her status as a probationer. Both sections (2241 and 2255) use the term "prisoner" in referring to the person in "custody" who has the right to claim the benefits of the sections. To give effect to the clear meaning and intent of Congress in enacting the statute it can only be held that Congress meant what it said and that the remedies under these statutes are restricted to a "prisoner" in "custody", and are not to be indiscriminately extended to persons not prisoners nor in custody but parolees and probationers free and enlarged upon parole or probation.

The precise question of whether one on probation may bring a motion under Section 2255 has been determined adversely to appellant's position in *United States v. Bradford* (2nd Cir., 1952), 194 F. 2d 197. There, petitioner, while on probation, brought a motion under 28 U. S. C. A. 2255. Judge Learned Hand, speaking for the Second Circuit, held that not being in custody the petitioner was in no position to review his conviction either by habeas corpus or by a Section 2255 motion. Of further interest is the case of *United States v. Lavelle* (2nd Cir., 1951), 194 F. 2d 202, wherein the Court stated:

> "Before we can reach the merits of the controversy we must determine whether the district court had jurisdiction to entertain the appellant's motion. *United States v. Bradford,* 2nd Cir., 1952, 194 F. 2d 197. The question whether the remedy provided by Section 2255 is available to a convicted defendant who has completely executed his sentence and has been released from custody thereunder had not been decided by this court at the date of the hearing on the appellant's motion. We noted the existence of the question in *United States v. Rockower,* 2nd Cir., 171 F. 2d 423, 425, but did not find it necessary to determine it. It was, however, determined in *United States v. Bradford, supra.* In accord with that decision is *Lopez v. United States,* 9th Cir., 186 F. 2d 707, affirming the lower court upon the authority of *Crow v. United States,* 9th Cir., 186 F. 2d 704. Since the appellant was not in custody under the sentence, his motion attacked, the district court lacked jurisdiction to entertain it. Accordingly the order is reversed and the cause remanded with directions to dismiss the motion for lack of jurisdiction."

The case of *Lopez v. United States,* above referred to (9th Cir., 1950, 186 F. 2d 707) is a short *per curiam* order hereinbelow quoted in its entirety:

> "This is an appeal from an order denying a motion to vacate a sentence which appellant contends the district court had no jurisdiction to impose. The motion was made pursuant to the provisions of Section 2255, 28 U. S. C. A.
>
> "It was stipulated during the argument of the appeal that the appellant is not in custody under the sentence he is attacking. In fact, the said sentence has been served. Appellant is now in custody under a separate, distinct and unrelated sentence.
>
> "Upon authority of *Crow v. United States,* 9th Cir. 186 F. 2d 704 the judgment is affirmed."

Crow v. United States (9th Cir., 1950), 186 F. 2d 704, cited in the previous two cases contains the following language at page 706:

> "If appellant's position was sustained, the proceeding under the section could be invoked to set aside sentences served as well as sentences to be served in the future. Since the motion under Section 2255 was designed to provide a direct attack in place of collateral attack under habeas corpus, it was logical to conclude that the intent of Congress was to limit the scope of relief under it to that on habeas corpus. *Relief under habeas corpus is limited to release from present detention.* It is not available to test the legality of threatened detention. It does not lie to secure a judicial decision which, even if determined in the prisoner's favor, *would not result in his immediate release."* (Emphasis added.)

Nor can appellant avoid the import of the above decisions by the explanation attempted at page 24 of her brief

wherein she calls attention to the statutory expression that a motion under 2255 can be brought "at any time." In view of what has gone before, it is apparent that such a statement is subject to the necessary limitation that the person bringing the motion be a prisoner in custody at the time the motion is so brought. It is respectfully submitted by the Government that appellant Karrell being on probation lacked the requisite status of a prisoner in custody upon which to predicate a motion under Section 2255.

IV.

Appellant Cannot Maintain the Instant Appeal Inasmuch as It Has Become Moot.

Appellant Karrell was on probation from January 24, 1951, until January 24, 1956 at which time she made the motion the denial of which prompted the instant appeal. Under the cases cited under the previous heading, even during that period, she was not "in custody", so as to entitle her to bring a motion under Section 2255. But even if it be held *arguendo* that a person on probation is sufficiently "in custody" to avail himself of Section 2255, it must be considered that on January 30, 1956 appellant was by order of Court discharged from the custody of the Marshal, thereby terminating her sentence in all respects. From that time forward she has been in no custody, actual or constructive, and despite any severe financial repercussions resulting from her conviction, the question of the legality of her custody has become moot. In this connection it is to be noted that the continuing disabilities, she alleges result from her conviction, are due not to the action of the Court or its officers, but are due solely to the action of an independent board (of realtors) in suspending her realtors license.

When, during the pendency of an appeal, a case becomes moot so there is no longer any case of controversy before the Court, there is a loss of jurisdiction.

United States v. Alaska S. S. Co. (1922), 53 U. S. 113, 116;

United States ex rel. Eisler v. District Director of Immigration & Naturalization of Port of New York (2nd Cir., 1947), 162 F. 2d 408;

Cover v. Schwartz (1943), 133 F. 2d 541;

Selected Products Corp. v. Humphreys, et al. (7th Cir., 1936), 86 F. 2d 821.

The Supreme Court recently stated:

> "The established practice of the court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending, our decision on the merits is to reverse or vacate the judgment below and remand with the direction to dismiss. *United States v. Munsingwear, Inc.,* 1950, 340 U. S. 36 and note 2 at page 39. In this connection it is of course established that while Section 2255 (*supra*) provides for remedy in the nature of habeas corpus, like habeas corpus it is in its nature a civil rather than a criminal proceeding even though invoked on behalf of persons charged with and convicted of crime. *Marcado v. United States,* 183 F. 2d 486; *Hayman v. United States,* 342 U. S. 205; *Burgess v. King,* 1942, 8th Cir., 130 F. 2d 761."

Inasmuch as a writ of habeas corpus or a motion under Section 2255 can ultimately only secure the goal of setting at liberty a person unlawfully held, it is apparent that appellant Karrell, having attained the desired status of liberty, has obtained any and all remedies she could, in

contemplation of law, obtain under these sections. Accordingly it is the position of the Government that the appeal has become moot and should be dismissed.

Conclusion.

Appellant is incorrect in her attempt to negate the incorporation by Congress of the penal provisions of Section 715 of Title 38, U. S. C. A. by the incorporating provisions Section 697 of Title 38, U. S. C. A.

Appellant's contention that the incorporation purports to incorporate the entire section (715) is not borne out by a careful reading of the statute nor of the case law interpreting it. Both statutes and cases clearly indicate that it is not the section as a whole but merely the *penal provisions* thereof which were intended to be incorporated into the Servicemen's Readjustment Act of 1944. Accordingly, any limitations which may be contained within Section 715 as to its applicability to certain enumerated sections are clearly not penal provisions and such limitations are not applicable to the 1944 Act.

Appellant's motion under 2255 (*supra*) goes solely to a pure question of law arising out of statutory interpretation. Her attempts to liken her petition to a writ of *coram nobis* must be unavailing in view of the fact that *coram nobis* lies only for correction of errors of fact extrinsic of the record. Accordingly her remedy, if it exists at all must be by way of 2255 (*supra*) as akin to relief by habeas corpus.

Title 28, U. S. C. A., 2255, is governed by the same authority as is habeas corpus which is codified in 28 U. S. C. A. 2241. It is settled that actual rather than mere moral restraint is a prerequisite to the successful prosecution of a writ of habeas corpus. Karrell being

enlarged upon five years' probation was not in such custody as would entitle her to habeas corpus or to a motion to vacate under Section 2255. In addition, the day after the filing of the motion to vacate, Karrell's probationary period ended and with it all semblance of even the most technical restraint. Thus, the appeal is moot, and when a case becomes moot during the pendency of an appeal, the appeal will be dismissed. In the premises, the Government respectfully urges this Honorable Court that the order of the Honorable William C. Mathes denying appellant's petition to vacate her sentence under Section 2255, should be affirmed.

Respectfully submitted,

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